IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 25, 2008 Session

STATE OF TENNESSEE v. ERIC R. HINTON

Appeal from the Circuit Court for Sevier County
No. 8953-III Rex Henry Ogle, Judge

No. E2007-00657-CCA-R3-CD - Filed December 15, 2008

Appellant, Eric R. Hinton, was convicted by a Sevier County Jury of one count of rape of a child. As a result, he was sentenced to twenty-two years incarceration, to be served at one hundred percent. Appellant appeals the judgment of the trial court. On appeal, he alleges that: (1) the trial court improperly allowed Appellant's statement to be admitted into evidence; (2) the trial court improperly denied the motion for new trial after the victim recanted her trial testimony; (3) the trial court improperly admitted statements of the victim as excited utterances; (4) the trial court improperly sentenced him to twenty-two years in confinement; (5) the trial court should have charged the jury with the lesser included offense of aggravated assault; and (6) the trial court refused to allow a witness to testify that would have impeached the victim's testimony. After a thorough review of the record, we determine that Appellant's sentence should be modified to twenty years. In all other respects we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed as Modified.

JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Eugene B. Dixon, Maryville, Tennessee, for the appellant, Eric R. Hinton.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General; and Steven Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Appellant was indicted in May of 2002 for the rape of his niece, A.M.,[1] which occurred on a family trip to the Gatlinburg area in November of 2001. A.M., who was ten years old at the time, lived in Laurel, Mississippi with her mother, her father, and two sisters. Appellant and his wife, Evelyn Hinton, lived about an hour and a half away in Richland, Mississippi. A.M. thought of Appellant as her "second daddy" and often spent time with him and Evelyn during the summer. In November of 2001, A.M.'s mother agreed to let A.M. go on a trip to Pigeon Forge with Appellant and his wife. The stayed in one hotel room with two beds. A.M. slept in one of the beds, and her aunt and Appellant slept in the other bed.

On the second night of the trip, A.M.'s aunt gave her some Tylenol PM for growing pains in her legs. A.M.'s aunt took some pain medication and fell asleep first. According to A.M., it is difficult to wake her aunt when she takes the medication. A.M. lay down in the bed and tried to go to sleep. She had on a shirt, pants, and panties. When she got into bed, her uncle was sitting in a chair beside the bed watching television. A.M. said it looked like there was "[s]ome man taking pictures of a naked woman" on the television.[2] The private parts of the people were "blurry." Appellant told A.M. to take off her pants.

After A.M. got into bed, Appellant gave her a "diamond-shaped" pill and told her to swallow the pill. She had never seen or taken that type of pill before. The victim was trying to go to sleep, when she felt Appellant "poking [her] stomach and down [her] hip onto [her] leg, trying to see if [she] was awake." A.M. acted like she was asleep. Appellant then moved her panties down "a little bit" to the top of her legs. Appellant then "put his finger inside [her] . . . privates . . . [and] moved it up and down." A.M. rolled over and acted like she was waking up. At that point, Appellant "jumped up and sat in the chair again right beside [her] bed." Appellant asked A.M. if she couldn't sleep. She replied "no" and jumped up and ran to the bathroom crying. She noticed on her way to the bathroom that Appellant was not wearing any pants.

A.M. stayed in the bathroom for a while, then came out and went back to bed. At that time, Appellant was wearing shorts. Appellant then turned off the light and got into bed with her aunt. The victim asked if she could use a phone to call her mother and tell her goodnight. A.M. told her mother goodnight and then took the phone into the bathroom.

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[1] It is the policy of this Court to refer to minor victims of sexual assault by their initials.

[2] According to the Guest Services Manager of the Shular Inn in Pigeon Forge, the televisions in the rooms do not have the capability to show X-rated or pornographic movies. The rooms are also not equipped with VCR's or pay-per-view movies.

In the early morning hours of November 21, 2001, A.M.'s mother received a telephone call from A.M. in which she claimed that Appellant "molested" her. A.M.'s mother sent her brother, Charles King, who also happened to be vacationing in the area, to get her daughter. A.M.'s mother arrived in Gatlinburg early the next morning and contacted police.

According to A.M.'s mother, when A.M. called her from the hotel room, she did not realize that anything was wrong. After A.M. began talking however, her mother heard her start to cry. A.M. refused to tell her what happened, only saying that it was "bad" and that she "[could not] tell." The victim was making the phone call from the bathroom, and Appellant was outside the door listening to the conversation. A.M. pleaded with her mother to come and get her.

The victim's mother spoke with Appellant, who assured her that A.M. had merely had a bad dream and woke up scared. Appellant put the victim back on the phone, and her mother realized that she was "talking funny." Her mother asked whether the victim had taken any of her Aunt Evelyn's pain medication. The victim told her mother that she was given two Tylenol PM by Evelyn and a "little bitty white pill" by Appellant that made her feel "weird." The victim stated that the pill was white and had A532 or A332 written on it.[3]

A.M.'s mother told A.M. to put on a coat and go outside to talk to her on the phone. Once outside, the victim started crying "real hard" and told her mother that Appellant "molested" her. Her mother stated that the victim was upset during most of the conversation and that she was never really able to calm her down. A.M.'s mother assured the victim that she was coming to Tennessee to get her but instructed her not to tell Appellant about the plans.

The victim's mother called her brother, Charles King, and asked him to go pick up the victim. Mr. King picked A.M. up and took her to his hotel room. When A.M.'s mother finally arrived in Tennessee, the victim told her that Appellant "touched" her. Specifically, she told her mother that:

> [Appellant] was sitting in a chair. He just had a T-shirt on. She said it was one of his work shirts. She said he was watching a movie of a man taking picture of a naked woman. He didn't have no [sic] pants on. He - he thought she was asleep.
>
> He come [sic] over to the bed. I can't remember if she said he knelt down or laid beside her. And he started putting his hand in her pants. He pulled her panties down some and he stuck two fingers in her and she started moving like she was waking up. And he got up and went and sit [sic] in the chair. And she said she got up, went to the bathroom, and when she come back out he had shorts on.

The victim's other uncle, Charles King, picked her up at the hotel. When he arrived with his wife, the victim was "just sitting there." The victim did not say much of anything. Mr. King asked

[3] In an exhibit introduced at trial, a picture of a 2 mg Zanaflex Tablet was a white round pill with "A532" written on it.

her what had happened, and the victim told him that Appellant had touched her on the behind. In his statement to police, Mr. King described A.M. as "very drowsy and upset."

After A.M.'s mother arrived, they contacted local police. A.M. met with Detective Kenny Bean of the Pigeon Forge Police Department. After meeting with Detective Bean, A.M. was sent to Children's Hospital to be examined for signs of penetration. The victim explained what Appellant did to her and then wrote a statement for police in which she alleged that Appellant put his finger inside her in the hotel room.

At Children's Hospital, Dr. Robert Lumberski examined A.M. for signs of sexual abuse. The victim arrived at the hospital at 5:54 p.m. on November 21, 2001. The victim told Dr. Lumberski that she had been touched. The victim's genital examination was normal but did not rule out digital penetration. Dr. Lumberski explained that with digital penetration, he did not expect to see any tears, blood, or injuries to the victim. A.M.'s drug screen was normal. The drug screen did not test for Zanaflex.[4] Dr. Lumberski did not recall a DNA test being performed.

Appellant brought Theodore Yeshion, a forensic scientist specializing in blood and body fluid identification and DNA analysis, to testify at trial. According to Mr. Yeshion, DNA testing was appropriate in this case and it was highly possible that DNA could have been recovered from the victim. He acknowledged that a finding of Appellant's DNA on the victim's hand area would only show some form of contact between the two individuals. Mr. Yeshion did acknowledge that if Appellant took a shower, some of the evidence could be removed.

Detective Kenny Bean interviewed Appellant at the police station. Appellant drove to the station on his own and was not handcuffed or under arrest at the time of the interview. Detective Bean advised Appellant of his rights. Appellant signed an admonition and waiver form after Detective Bean explained each of Appellant's rights to him. Appellant told Detective Bean that he understood his rights and that he did not want to talk to an attorney. Appellant signed the waiver form at 3:35 p.m. and gave a written statement at 5:30 p.m.

Appellant's written statement reads as follows:

> I gave [A.M.] a Zanaflex. I thought she was asleep. I knelt down beside the bed and touched her behind and moved my hand around to the front. I pulled away when by [sic] finger went inside. I am so sorry [sic] what I did and ask for forgiveness from [A.M.] and my family. End of statement.

According to Detective Bean, the victim was en route to the hospital during the interview of Appellant. He denied that he told Appellant that the victim had already been examined and that evidence of sexual penetration had been discovered. Rather, Detective Bean claimed that he told

[4]The victim claimed at some point that Appellant gave her a diamond-shaped pill that she thought was Zanaflex, a drug taken by her aunt for pain relief.

Appellant that there "could be" forensic evidence to support the case. Additionally, Detective Bean claimed that he did not make any promises to Appellant during the interview.

Detective Bean described Appellant's demeanor at the beginning of the interview as fine but noted that Appellant became very upset after confessing to the offense. Detective Bean asked Appellant if he wanted to pray. The two then said a prayer together.

Appellant's wife testified in his behalf at trial. According to Mrs. Hinton, on the night of the incident, she gave A.M. two Tylenol PM for growing pains. Mrs. Hinton took Oxycontin for her back pain. Several weeks prior to the trip to Tennessee, Mrs. Hinton's doctor took her off Zanaflex and prescribed a new medication for her back. Mrs. Hinton testified that she did not bring any Zanaflex on the trip but that the Tylenol PM was in an old Zanaflex bottle.[5]

After Mrs. Hinton gave the victim her medication, Mrs. Hinton went to sleep. She recalled that Appellant was sitting in the chair and the victim was lying on the bed. Later that night, Mrs. Hinton was awakened by the victim, who claimed that "[Appellant] touched [her] booty."

At the conclusion of the proof, the jury found Appellant guilty of rape of a child. At a sentencing hearing, the trial court sentenced Appellant to twenty-two years incarceration, to be served at 100%. Appellant filed a motion for new trial, which was denied by the trial court. Subsequently, Appellant filed a timely notice of appeal.

After Appellant filed his brief with this Court, the State argued that several of Appellant's issues were waived for failure to provide an adequate record. Specifically, the State pointed out the fact that the record did not contain the hearing on the motion to suppress, the sentencing hearing, or the hearing on the motion for new trial. At oral argument, Appellant moved to supplement the record with the transcripts of the motions hearing and sentencing hearing. This Court allowed Appellant to supplement the record with the requested documents. After the supplemental record was submitted to this Court, the State filed a supplemental brief in which it argued that one of Appellant's issues was still waived because the record still did not contain the transcript of the hearing on the motion for new trial. Appellant filed a motion seeking supplementation of the record with the missing transcript. This Court granted Appellant's request, and the record was supplemented with the transcript of the hearing on the motion for new trial.

Appellant appeals his conviction and sentence. On appeal, he raises the following issues for our review: (1) whether the trial court improperly allowed Appellant's statement to be admitted into evidence; (2) whether the trial court improperly denied the motion for new trial after the victim recanted her trial testimony; (3) whether the trial court improperly admitted statements of the victim as excited utterances; (4) whether the trial court improperly sentenced him to twenty-two years in confinement; (5) whether the trial court should have charged the jury with the lesser included offense

[5] On rebuttal, Detective Bean testified that Mrs. Hinton told him that she brought Zanaflex on the trip to Pigeon Forge.

of aggravated assault; and (6) whether the trial court refused to allow a witness to testify that would have impeached the victim's testimony.

Analysis

Denial of Motion to Suppress

First, Appellant claims that the trial court improperly denied his motion to suppress. Specifically, he claims that his "inculpatory statement" was involuntary and inadmissible because it was the result of "police misrepresentation" and was "induced by a promise of leniency." The State argues that the evidence does not preponderate against the trial court's decision to deny the motion to suppress.

This Court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise. *State v. Hayes*, 188 S.W.3d 505, 510 (Tenn. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. Our review of a trial court's application of law to the facts is de novo, with no presumption of correctness. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)).

The Fifth Amendment to the United States Constitution provides in pertinent part that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Similarly, Article I, Section 9 of the Tennessee Constitution states that "in all criminal prosecutions, the accused "shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. However, an accused may waive this right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the United States Supreme Court held that a suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479. The Supreme Court held that a suspect may knowingly and intelligently waive the right against self-incrimination only after being apprised of these rights. *Id.* Accordingly, for a waiver of the right against self-incrimination constitutionally valid, the accused must make an intelligent, knowing, and voluntary waiver of the rights afforded by *Miranda*. *Id.* at 444. In considering the totality of the circumstances a court should consider:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement

> in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996) (citing *State v. Readus*, 764 S.W.2d 770, 774 (Tenn. Crim. App. 1988)). However, no single factor is necessarily determinative. *State v. Blackstock*, 19 S.W.3d 200, 208 (Tenn. 2000) (citing *Fiarchild v. Lockhart*, 744 F. Supp. 1429, 1453 (E.D. Ark. 1989)). Further, "[a] trial court's determination that a confession was given knowingly and voluntarily is binding on the appellate courts unless the defendant can show that the evidence preponderates against the trial court's ruling." *State v. Keen*, 926 S.W.2d 727, 741 (Tenn. 1994).

A court may conclude that a defendant voluntarily waived his rights if, under the totality of the circumstances, the court determines that the waiver was uncoerced and that the defendant understood the consequences of waiver. *State v. Stephenson*, 878 S.W.2d 530, 545 (Tenn. 1994). In order to be considered voluntary, the statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Bram v. United States*, 168 U.S. 532, 542-43 (1897); *see also State v. Kelly*, 603 S.W.2d 726, 727 (Tenn. 1980). However, "[a] defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional sense." *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996). Instead, "'coercive police activity is a necessary predicate to finding that a confession is not voluntary . . . .'" *Id.* (*quoting State v. Brimmer*, 876 S.W.2d 75, 79 (Tenn. 1994)).

In the case herein, we determine that Appellant has failed to establish that the evidence preponderates against the trial court's determination that the statement was freely and voluntarily given. Detective Bean testified that Appellant agreed to talk to him and made his statement in a "free and voluntary" manner. Appellant testified that he felt that he was unable to leave once the interview started. He claimed that Detective Bean misled him when he said that there was "[forensic] evidence that [he] had penetrated]the victim." Appellant later learned that at that time the victim had not even been to the hospital. Appellant claimed that Detective Bean told him he had the "gift of discernment from God" and "could tell when people were lying." Detective Bean denied this claim. Appellant also claimed that Detective Bean promised leniency in exchange for cooperation. Again, Detective Bean denied that he promised leniency to Appellant in exchange for cooperation.

After hearing the evidence, the trial court determined that Detective Bean was credible and that he advised Appellant of his constitutional rights. Furthermore, the trial court determined that there was no evidence that Detective Bean "coerced, threatened, intimidate[d], or in any other way violated [Appellant's] constitutional rights against self-incrimination." The evidence does not preponderate against the judgment of the trial court. The trial court was the party responsible for

assessing the credibility of the witnesses as well as resolution of conflicts in the evidence. *Odom*, 928 S.W.2d at 23. Appellant is not entitled to relief on this issue.

Admission of Statements of the Victim as Excited Utterance

Next, Appellant claims that the trial court improperly admitted the statements of the victim through the testimony of her mother. Specifically, Appellant argues that the evidence amounted to inadmissible hearsay. The State contends that the testimony was properly admitted pursuant to the excited utterance exception to the hearsay rule under Tennessee Rule of Evidence 803(2).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). For a hearsay statement to be admissible, it must fall within the hearsay exceptions provided at Rule 803 of the Tennessee Rules of Evidence.

One of the long-recognized exceptions to the hearsay rule is the excited utterance exception found at Rule 803(2) of the Tennessee Rules of Evidence. This exception applies to statements, "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In *State v. Land*, 34 S.W.3d 516 (Tenn. Crim. App. 2000), this Court stated that "[t]he underlying theory of this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." 34 S.W.3d at 528. For a statement to fall within this exception, three criteria must be met: (1) there must be a startling event or condition that causes the stress of excitement; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant was under the stress of excitement. *Id.* at 528-29 (citing Neil P. Cohen, et. al., *Tennessee Law of Evidence* § 803(2).2 at 533-34 (3d ed. 1995)).

It is clear that A.M.'s statements to her mother on the telephone fall within the excited utterance exception found at Rule 803(2) of the Tennessee Rules of Evidence. As for the first criteria, Appellant's kneeling next to the victim's bed, pulling her panties down, and vaginally penetrating her would certainly be a startling event. This is especially true when one considers the fact that A.M. was ten years old at the time of the incident. As for the second criteria, A.M.'s statements describing to her mother over the telephone that Appellant had "molested" her and had done something "bad," these unquestionably relate to the startling event. The third criteria is also satisfied. A.M. testified that she called her mother almost immediately after the event occurred. Clearly, A.M. would still have been under emotional and even physical stress from the rape. Because the statements in question fit within the excited utterance exception to the hearsay rule, this issue is without merit.

Denial of Motion for New Trial on Basis of Recanted Testimony by Victim

Appellant argues on appeal that the trial court improperly denied the motion for new trial on the basis that the victim recanted her trial testimony. Specifically, Appellant argues that the victim

signed an affidavit, in which she recanted her testimony that Appellant penetrated her with his finger. The State argues that "the trial court properly determined that the affidavit allegedly written by the victim was not enough to support the grant of a new trial."

"A new trial may be granted because of recanted testimony when: (1) the trial judge is reasonably well-satisfied that the testimony given by a material witness was false and that the new testimony is true; (2) the defendant was reasonably diligent in discovering the new evidence, was surprised by false testimony, or was unable to know of the falsity until after the trial; and (3) the jury might have reached a different conclusion had the truth been told." *State v. Housler*, 193 S.W.3d 476, 494 (Tenn. 2006); (*citing State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999)). The decision as to whether to grant a motion for new trial on the basis of newly discovered evidence lies within the sound discretion of the trial court. *State v. Caldwell*, 977 S.W.2d 110, 117 (Tenn. Crim. App. 1997) (citing *Hawkins v. State*, 417 S.W.2d 774, 778 (Tenn. 1967)).

First, although the trial judge made no formal findings about the first prong, he determined that the affidavit itself, which was not subject to cross-examination, was "not sufficient for the Court to set aside a conviction." Therefore, the trial court presumably found A.M.'s recantation not credible, since a new trial was not ordered. We agree with this conclusion. The Appellant presents no evidence other than the affidavit to support the recantation of the testimony. Counsel for Appellant admitted that he had only talked with the victim during cross-examination at trial. Secondly, it does not appear that Appellant was "diligent" in obtaining the evidence. At the hearing on the motion for new trial, counsel for Appellant stated that just prior to the filing of the amended motion for new trial he was informed that there was a "possibility" that A.M. had approached Appellant's wife in an effort to recant her testimony. Counsel for Appellant made no effort to follow up on this lead and was contacted by "the family [of Appellant]" nearly nine months later. During this conversation, counsel for Appellant learned of the existence of the affidavit in which A.M. recanted a portion of her testimony. Under these circumstances the trial court properly denied a new trial based on recanted testimony.

Lesser Included Offenses

Appellant next argues that the trial court erred by not instructing the jury on aggravated assault as a lesser included offense of rape of a child. The State disagrees, citing *State v. Page*, 184 S.W.3d 223 (Tenn. 2006), and arguing that Appellant's failure to request the lesser included instructions in writing results in a waiver of this issue on appeal.

Tennessee Code Annotated section 40-18-110 requires the defendant to request lesser included offense instructions in writing at trial in order to subsequently appeal a trial court's failure to instruct on such offenses. Tennessee Code Annotated section 40-18-110 states, in pertinent part:

> (b) In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought,

> the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any such charge.
>
> (c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, such instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for new trial or on appeal.

In *Page*, the Tennessee Supreme Court determined that Tennessee Code Annotated section 40-18-110 was constitutional, concluding that "if a defendant fails to request an instruction on a lesser-included offense in writing at trial, the issue will be waived for purposes of plenary appellate review and cannot be cited as error in a motion for new trial or on appeal." *Page*, 184 S.W.3d at 229. However, the court went on to note that appellate courts were not precluded from reviewing the issue sua sponte under the plain error doctrine. *Id.* at 230.

The record on appeal shows that trial counsel failed to request lesser included offense jury instructions in writing. Thus, Appellant has waived this issue on appeal. *See Page*, 184 S.W.3d at 229.

We now address whether it was plain error for the trial court to fail to give a lesser included offense instruction on aggravated assault, even when Appellant did not properly preserve the issue for appeal. When determining whether plain error review is appropriate, the following five factors must be established:

> (a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused [must not have waived] the issue for tactical reasons; and
> (e) consideration of the error [must be] "necessary to do substantial justice."

State v. Terry, 118 S.W.3d 355, 360 (Tenn. 2003) (citing *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted)).

In the present case, at trial, Appellant failed to request a lesser included offense instruction on aggravated assault. Appellant has failed to show that he did not waive this issue for tactical reasons or that an unequivocal rule of law has been breached. Aggravated assault is not a lesser included offense of rape of a child under the test set forth in *State v. Burns*, 6 S.W.3d 453(Tenn. 1999). *See* 6 S.W.3d at 466-67. The offense of aggravated assault includes the additional elements of either serious bodily injury or the use of a deadly weapon. Appellant concedes this in his brief but argues that it is "conceivable that the offense of aggravated assault fails to meet the definition in part (a) [of *Burns*] only in the respect that it contains a statutory element establishing a different mental state indicating a lesser kind of culpability; and/or a less serious harm or risk of harm to the

same person." We disagree. Consequently, the trial court's failure to instruct on aggravated assault does not rise to the level of plain error. Appellant is not entitled to relief on this issue.

Failure of Trial Court to Allow Testimony of Detective Matthew Ishey for Impeachment

Appellant argues that the trial court erred in determining that Detective Matthew Ishey could not testify about his investigation into the victim's false allegation of abuse by her father. Counsel for Appellant sought to use this testimony to impeach the credibility of the victim. The State argues that Appellant has waived this issue for failure to cite to any authority to support his proposition.

While we acknowledge the deficiency in Appellant's brief for failure to cite to any authority to support his proposition and point out that this Court could determine that Appellant has waived this issue for failure to do so under Tennessee Rule of Criminal Procedure 10(b), we will address the issue nonetheless.

Appellant has not shown that the trial court abused its discretion in excluding the testimony of Detective Ishey. The victim was cross-examined by counsel for Appellant about a statement she made to Melanie MacNeil in which the victim claimed that her father had molested her. During cross-examination, A.M. admitted that this statement was false. Despite A.M.'s admission that the statement was false, counsel for Appellant sought to introduce the testimony of Detective Ishey. The trial court ruled that the testimony was inadmissible because of the victim's admission that the statement was false. The admission that the prior accusation of abuse against her father was false rendered Ishey's prospective testimony irrelevant for impeachment purposes. Moreover, any testimony from Detective Ishey would have been merely cumulative and, even if relevant, properly excludable under Tennessee Rule of Evidence 403. The trial court did not abuse its discretion in refusing to allow Ishey to testify.

Sentencing

Next, Appellant complains that the trial court "imposed a sentence which exceeded the statutory midpoint by two years. Specifically, Appellant avers that the trial court erred in applying enhancement factors and mitigating factors in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), and that his sentence should be reduced to the "statutory midpoint" of twenty years. The State agrees.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the presentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*,

823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169. In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).[6]

In the case herein, Appellant was sentenced as a Range I offender for the Class A felony of rape of a child. *See* T.C.A. § 39-13-522(b). The range of punishment for a Range I offender convicted of a Class A felony is fifteen to twenty-five years. T.C.A. § 40-35-112(a)(1). The trial court found that one enhancement factor and two mitigating factors applied and sentenced Appellant to a sentence of twenty-two years.[7] Pursuant to Tennessee Code Annotated section 40-35-210(c), "[t]he presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors." Procedurally, the trial court starts at the midpoint of the sentencing range, increasing the sentence within the range as appropriate based upon the existence of enhancement factors, and then, reducing the sentence within the range as appropriate based upon the existence of mitigating factors. T.C.A. § 40-35-210(d)-(e).

The trial court determined that Appellant admitted that he had abused a position of private trust and that he admitted to this enhancement factor in his confession to the police. T.C.A. § 40-35-114(16). As a result, the trial court enhanced Appellant's sentence from the midpoint of twenty years to twenty-two years. This Court has held that a statement to police does not constitute an admission by a defendant for the purposes of *Blakely*. *See State v. Charles Vantilburg, III*, No. W2006-02475-CCA-R3-CD, 2008 WL 382765, at *9 (Tenn. Crim. App., at Jackson, Feb. 12, 2008), *perm. app. denied*, (Tenn. Aug. 25, 2008) (determining that statements made to police were extrajudicial and did not constitute an admission by the defendant for the purposes of *Blakely*); *State v. Phillip Aaron York*, No. E2003-02883-CCA-R3-CD, 2005 WL 280351, at *6-7 (Tenn. Crim.

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[6] In response to *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee Legislature amended Tennessee Code Annotated section 40-35-210. *Compare* T.C.A. § 40-35-210(c) (2003) *with* T.C.A. § 40-35-210(c) (2006). This amendment became effective on June 7, 2005. The legislature also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Act ch. 353, § 18. In addition, if a defendant committed a criminal offense on or after July 1, 1982 and was sentenced after June 7, 2005, such defendant can elect to be sentenced under these provisions by executing a waiver of their ex post facto protections. *Id*. Appellant herein committed the offenses prior to June 7, 2005, and there is no ex post facto waiver executed by Appellant in the record herein. Thus, the amendment to Tennessee Code Annotated section 40-35-210 does not apply to Appellant.

[7] Appellant contends in his brief that the trial court also enhanced his sentence because "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement." T.C.A. § 40-35-114(8). From the transcript of the sentencing hearing, it does not appear that the trial court utilized this enhancement factor.

App., at Knoxville, Feb. 3, 2005), *perm. app. denied*, (Tenn. May 31, 2005). Further, even though Appellant testified at the sentencing hearing, he did not discuss the details of his relationship with A.M. Finally, while the trial court referred to the presentence report, it is not included as an exhibit to the sentencing hearing. Therefore, the enhancement factor used by the trial court to enhance Appellant's sentence was not submitted to a jury or admitted by Appellant. Consequently, our review of Appellant's sentence is de novo and the rule in *Blakely* precludes application of this factor. While the trial court concluded that Appellant's crime was mitigated by the fact that Appellant neither caused nor threatened seriously bodily injury or death, Tennessee Code Annotated section 40-35-113(1), the record indicates that the potential for bodily injury certainly existed on the basis that Appellant gave the victim prescription pain medication prior to raping her. We determine that this mitigating factor should be given little weight. The trial court also determined that Appellant had led a "good life" and had a "work history" and lumped all of those mitigating factors together. After a de novo review, we determine that because there are no enhancement factors that were proven to a jury beyond a reasonable doubt or admitted by Appellant, the sentence should be modified to the presumptive minimum. *See State v. Chester Wayne Walters*, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034, at *25 (Tenn. Crim. App., at Nashville, Oct. 4, 2004), *perm. app. denied*, (Tenn. Mar. 21, 2005). Accordingly, Appellant's sentenced is modified to twenty years.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed as modified.

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JERRY L. SMITH, JUDGE